Office - Supreme Court, U.S.
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OCT 16 1984
ALEXANDER L. STEVAS
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No. 84-312

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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We showed in the petition that the court of appeals' analysis of the restrictions on participation in the Combined Federal Campaign set forth by Exec. Order No. 12,404, 3 C.F.R. 151, represents a significant departure from the standard prescribed by *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983), and other nonpublic forum cases of this Court. We also explained that the decision below creates serious practical problems for administration of the Campaign and may cause difficulties for federal officials in other contexts as well.

In their response to the petition, respondents attempt to minimize the significance of the court of appeals' decision by portraying it as a routine application of this Court's First Amendment precedents that will have limited practical

effect. That characterization is incorrect; it is belied by events that have occurred since respondents first challenged the Campaign's eligibility criteria in 1980 and by the fact that the court of appeals denied rehearing en banc of the decision below by an equally divided vote. Since many of respondents' contentions were anticipated and answered in the petition, only a short reply is required.

1. Respondents contend (Br. in Opp. 8-12) that the decision below rests on a factual finding by the court of appeals that they provide health and welfare services and are therefore indistinguishable from organizations that traditionally were included in the Campaign. But there unquestionably are differences between "cause"-oriented legal advocacy groups, like respondents, and the traditional health and welfare charities, like the American Red Cross, to which Campaign participation originally was limited. As amici United Black Fund of America, et al., point out (Br. 4-5, 9), advocacy groups may have entirely laudable purposes, but they are devoted to objectives that are "fundamentally different" from the provision of direct health and welfare services to persons in need. Respondents themselves do not suggest that they would have been eligible to participate in the Campaign as it was traditionally defined. The court of appeals' refusal to acknowledge the significance of the distinctions federal officials have perceived between groups like respondents, on the one hand, and traditional health and welfare charities, on the other, is simply a manifestation of its departure from the sort of deference this Court in the past has accorded to governmental judgments concerning access to nonpublic forums.

2. Respondents suggest (Br. in Opp. 12-13) that the decision below mandates admission to the Campaign of only a limited number of groups, not the full range of tax-exempt organizations. Respondents acknowledge (*id.* at 9), however, that the court of appeals relied in part on their

eligibility for tax exemption under 26 U.S.C. 501(c)(3) in concluding that respondents' status was identical to that of traditional health and welfare charities. Moreover, they do not dispute the court of appeals' apparent conclusion that any reference to direct health and welfare services to the needy must be assigned a definition that is considerably broader than that prescribed by the President in Exec. Order No. 12,404 and used by the five previous Administrations. In view of the court's expansive approach to classification of organizations, it seems clear that many tax-exempt groups could qualify for participation in the Campaign under the decision below.

3. Respondents attempt to minimize the significance of dissatisfaction among federal employees that has resulted from the recent inclusion of advocacy groups in the Campaign in response to court orders by noting that the amount raised by the Campaign has increased each year. See Br. in Opp. 3, 5, 13. But, as Judge Starr pointed out (Pet. App. 64a), the record indicates that those increases were achieved only through extraordinary and time-consuming efforts on the part of Campaign volunteers. Perhaps more important, the number of contributors to the Campaign has decreased in recent years — a development that obviously threatens the long-term success of the Campaign. See *id.* at 65a; C.A. App. 466; United Black Fund Am. Br. 10.[1] As amici United Black Fund of America, et al., observe (Br. 3), "[t]he strength of the Campaign depends on the good will of employees and their willingness to donate to the participant organizations." As we explained in the petition (at 20-21),

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[1]The brief of amici United Black Fund of America, et al., appears to contain (at 10) an incorrect citation to a *Washington Post* article. That article (found at *Washington Post*, Sept. 20, 1984, at A17, col. 3) correctly states that the percentage of federal employees participating in the Campaign has dropped from 70.6 in 1978 to about 54.5 in 1983.

past experience supports the President's judgment that inclusion of advocacy groups in the Campaign is likely to erode that good will and to diminish significantly the success of the Campaign.

4. Respondents contend finally (Br. in Opp. 14-16) that the decision below is of no continuing importance because the Office of Personnel Management has issued new regulations designed to govern operation of the Campaign being conducted during the fall of 1984. See 49 Fed. Reg. 32735 (1984) (to be codified at 5 C.F.R. Pt. 950). Respondents point out that the new regulations make substantial modifications in the structure of the Campaign, including, inter alia, elimination of national eligibility criteria and admission of all tax-exempt organizations to Campaign participation.

In fact, the magnitude of the changes made by the new regulations constitutes evidence of the practical impact of the decision below. As we noted in the petition (at 7 n.7), the new regulations represent OPM's effort to comply with the decision below pending further review. See 49 Fed. Reg. 32735 (1984). While OPM would prefer to administer the Campaign as it has in the past, its judgment is that successful accommodation of the changes mandated by the decision below requires fundamental restructuring of certain aspects of the Campaign. See *ibid.*

The preamble to the new regulations states that they are issued "without prejudice to [OPM's] right or duty further to modify the rules in the event of a supervening direction from a court, the Congress, or the President." 49 Fed. Reg. 32735 (1984). If this Court should grant the petition and uphold the traditional limitations on Campaign participation, as prescribed in Exec. Order No. 12,404, it is petitioner's intention to rescind the new regulations and to

conform the operation of the Campaign to the requirements set out in the executive order. See *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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DOJ-1984-10